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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/046,470	11/20/2001	Janos Bodor	F7575(V)	7515

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EXAMINER

BHAT, NINA NMN

ART UNIT	PAPER NUMBER
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1764

DATE MAILED: 10/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/046,470

Applicant(s)

BODOR ET AL.

Examiner

N. Bhat

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 July 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 10, 11, 14, 15 and 20-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10, 11, 14, 15 and 20-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114 was filed in this application after appeal to the Board of Patent Appeals and Interferences, but prior to a decision on the appeal. Since this application is eligible for continued examination under 37 CFR 1.114 and the fee set forth in 37 CFR 1.17(e) has been timely paid, the appeal has been withdrawn pursuant to 37 CFR 1.114 and prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on July 25, 2005 has been entered.

2. Applicant's amendments to the claims have been considered however, based on some newly found art, the claims remain unpatentable. A new ground of rejection follows:

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

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5. Claims 1, 3-8, 10-11, 14-15 and 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Runge et al. [USP 6,261,598] in combination with GB 2 274 235.

Runge teaches a carotenoid formulation comprising beta-carotene, lycopene and lutein, which are used in human and animal foods, cosmetics and pharmaceuticals. Applicant has argued that a yellowness factor of less than 4000 and yellowness index of 1-90 has not been taught or suggested by Runge et al. Further, applicant argues that Runge et al. does not suggest minimizing the yellow color in the food with large amounts of carotenoids. The examiner does not dispute these facts. However, the claims are drawn to a composition and the composition recites an edible composition comprising at least 15 mg/Kg of one or more colored carotenoids being evenly distributed in the composition. Runge specifically teaches making beta-caroten/lycopene/lutein in dry powdered form, emulsion form, oil soluble form and encapsulated in a gelatin capsule. The carotenoids are used in the amounts in the same type of fat containing foods, such as margarine, butter, cheese, soup, ice creams, sauces and dairy products wherein the carotenoid is evenly distributed in the food product. Runge et al. teaches that the carotenoid can be used in emulsion form, oil containing carotenoid form, dry powdered form, and encapsulated in gelatin, which is used in the food. [Note Column 4, lines 6-40]. It is maintained that with respect to applicant's claim to the yellowness factor and yellowness index, this would be an inherent property of the carotenoid composition of Runge et al and if not inherent the color would have been obvious as the law has interpreted that inherency is the epitome

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of obviousness. If the yellowness factor is new and unobvious applicant is strongly suggested to provide evidence that composition of Runge would not meet the yellowness factor. Applicant is reminded that the PTO has no testing facilities and if applicant is claiming the invention, article or composition in terms of physical properties as limitations such as yellowness factors and yellowness index, the burden of showing why Runge et al. would not provide a food composition having the yellowness factor and yellowness index as claimed by applicant.[Note the case law of *In re Spada* 911 F.2d 705,709, 15 USPQ 2d at 1255, 195 USPQ at 433].

However, Runge et al. does not specifically state that the edible composition comprises at least 10 wt%.

GB 2 274 235 teach a carotenoid foods supplement which includes an edible composition which includes carotenoids such as alpha-carotene, beta-carotene and lycopene encapsulated in a gelatin capsule in an edible oil.[Note the abstract] The composition is a dietary supplement which includes about 20-40 percent alpha-carotene, about 55-80 percent beta-carotene and about 3 percent to 20 percent lycopene, specifically the carotenoid material is a powdered vegetable material in an edible oil base encapsulated by gelatin.[Note Page 3, lines 7-20] The materials were encapsulated in amounts providing 1.5 mg of beta-carotene, 0.5 mg of alpha-carotene and 0.4 mg of lycopene per capsule. Because the composition includes a suspension of powdered materials in edible oil, the amount oil although not specifically recited, the amount to keep the powdered caretenoids in suspension, the amount of oil would obviously meet applicant's proviso of the composition at least 10 wt% fat. It is

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maintained that the although neither Runge et al. and GB 2 274 235 teach applicant's yellowness factor, the edible composition includes a composition comprising one or more colored carotenoids in an amount comprising at least 15 mg/kg which is includes 10% by weight fat and the that the carotenoids are encapsulated having a coating of at least one protein layer. This is taught by both references wherein the carotenoid is encapsulated in a gelatin, in GB 2 274 235 the composition includes colored carotenoids and that the carotenoids are suspended in oil and then encapsulated in a gelatin thereby reading on applicant's composition. To specifically provide the yellowness factor as claimed would have been obvious as the compositions include carotenoids in an edible composition in amounts and proportions within the range by applicant and therefore, absent criticality in showing the yellowness factor as claimed would have been obvious.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenn Caldarola can be reached on 571-272-1444. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'N. Bhat', with a long horizontal stroke extending to the right.

N. Bhat
Primary Examiner
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